FILE COPY

No. 785

FILED
MAR 7 1961
JAMES R. BROWNING, Clerk

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1960

ARCO AUTO CARRIERS, INC.,
ASSOCIATED TRANSPORTS, INC.,
AUTOMOBILE TRANSPORTS, INC. OF DELAWARE,
CENTRAL TRUCKAWAY SYSTEM,
COMPLETE AUTO TRANSIT, INC.,
L. & L. TRANSPORT, INC. OF INDIANA,
FLEET CARRIER CORPORATION,
FUGATE & GIRTON DRIVEAWAY COMPANY, INC.,
KENOSHA AUTO TRANSPORT CO., INC.,
KING TRANSPORT,
TRUCKAWAY CORPORATION,
ROBERT R. WALKER, INC.,
UNITED TRANSPORTS, INC.,
AUTO TRANSPORTS, INC.,
BURNHAM'S VAN SERVICE,
BEKINS VAN LINES,
NORTH AMERICAN VAN LINES, INC.,
NATIONAL VAN LINES, INC.,
WEATHERS BROTHERS TRANSFER COMPANY, INC. — *Appellants*

v.

STATE OF ARKANSAS, EX. REL.
BRUCE BENNETT, ATTORNEY GENERAL — *Appellee*

ON APPEAL FROM THE
SUPREME COURT OF THE STATE OF ARKANSAS

JURISDICTIONAL STATEMENT

MATHESON, DIXON & BIENEMAN
2150 Guardian Building
Detroit, Michigan
Of Counsel

GEORGE S. DIXON
2150 Guardian Building
Detroit 26, Michigan
LOUIS TARLOWSKI
601 Rector Building
Little Rock, Arkansas
Attorneys for Appellants

PARAGON PRINTING CO., LITTLE ROCK

INDEX

	Page
Jurisdictional Statement	1
Opinions Below	2
Jurisdiction	2
Questions Presented	3
Statutes Involved	4
Statement	4
The Questions are Substantial	7
Appendix A—Opinions of the Supreme Court of Arkansas	1a-5a
Appendix B—Certificate as to Existence of a Federal Question	7a-8a
Appendix C—Statutes	9a-12a

INDEX—(Continued)

Table of Cases

	Page
Braniff Airways *v.* Nebraska, 347 U.S. 590	9
Commercial Carriers, Inc. *v.* Kentucky Tax Commission, 321 S.W. 2d 42	12
Commonwealth of Pennsylvania *v.* Eastman Kodak Company, 124 A.2d 100, Cert. denied, 352 U.S. 952	12
Felten Truck Lines, Inc. *v.* The State Board of Tax Appeals of the State of Kansas, 327 P.2d 836	12
Gloucester Ferry Company *v.* Pennsylvania, 114 U.S. 196	12
Joseph *v.* Carter & Weekes Stevedoring Company, 330 U.S. 422	12
Lebeck *v.* State (Arizona), 156 P.2d 720	12
Michigan-Wisconsin Pipe Line Company *v.* Calvert, 347 U.S. 157	12
Minnesota *v.* Blasius, 290 U.S. 1	12
New York Central Railroad Company *v.* Miller, 202 U.S. 584	12
Ott *v.* Mississippi Barge Line, 336 U.S. 169	9
Pfeiffer *v.* State, 226 Ark. 825, 295 S.W. 2d 365	12
Pullman's Car Co. *v.* Pennsylvania, 141 U.S. 18	9
Railway Express Agency, Inc. *v.* Virginia, 347 U.S. 359	12
Spector Motor Service *v.* O'Connor, 340 U.S. 602	12
Stone (Roy) Transfer Company *v.* Messner (Penn.), 103 A.2d 700	12

No. ....

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

ARCO AUTO CARRIERS, INC.,
ASSOCIATED TRANSPORTS, INC.,
AUTOMOBILE TRANSPORTS, INC. OF DELAWARE,
CENTRAL TRUCKAWAY SYSTEM,
COMPLETE AUTO TRANSIT, INC.,
E. & L. TRANSPORT, INC. OF INDIANA,
FLEET CARRIER CORPORATION,
FUGATE & GIRTON DRIVEAWAY COMPANY, INC.,
KENOSHA AUTO TRANSPORT CO., INC.,
KING TRANSPORT,
TRUCKAWAY CORPORATION,
ROBERT R. WALKER, INC.,
UNITED TRANSPORTS, INC.,
AUTO TRANSPORTS, INC.,
BURNHAM'S VAN SERVICE,
BEKINS VAN LINES,
NORTH AMERICAN VAN LINES, INC.,
NATIONAL VAN LINES, INC.,
WEATHERS BROTHERS TRANSFER COMPANY, INC. — *Appellants*

v.

STATE OF ARKANSAS, EX REL BRUCE BENNETT, ATTORNEY GENERAL — *Appellee*

ON APPEAL FROM THE
SUPREME COURT OF THE STATE OF ARKANSAS

JURISDICTIONAL STATEMENT

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Supreme Court of Arkansas entered on November 21, 1960, rehearing denied January 9, 1961, upholding the validity and constitutionality of an Arkansas Statute authorizing the

assessment and collection of *ad valorem* taxes upon motor vehicles and properties, owned or leased by non-resident certificated motor carriers of property, and non-resident owners, moving and being operated and driven wholly in interstate commerce, into, through and across the State of Arkansas, over irregular routes and not upon schedule, and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINIONS BELOW

The opinion and decree of the Chancery Court of Pulaski County, Arkansas, Second Division, dated March 25, 1960, are unreported. The original opinion of the Supreme Court of Arkansas was rendered on November 21, 1960. It is unofficially unreported. The order of the Supreme Court of Arkansas denying a petition for rehearing was entered on January 9, 1961. Copy of the original opinion of November 21, 1960, of the Appellate Court, is attached hereto as Appendix "A" (Pages 1a-5a).

JURISDICTION

The opinion of the Supreme Court of Arkansas was delivered November 21, 1960 (R.324). The judgment of the Supreme Court of Arkansas was entered on November 21, 1960 (R.328). Rehearing denied January 9, 1961 (R.357). Notice of appeal filed January 24, 1961 (R. 361).

The jurisdiction of this Court is invoked under Title 28 U.S. Code, Section 1257 (2).

The Federal questions here sought to be reviewed were specifically and properly presented by briefs and petition to rehear (R.329), and were considered by, and determined adversely to the interest of the appellants by the Supreme

Court of Arkansas, as is reflected by Certificate as to Existence of a Federal Question ordered to be entered by the Court. Said Certificate appears at page 360 of the Record and is attached here as Appendix "B". (Pages 7a-8a).

Although the Supreme Court of Arkansas, in its opinion of November 21, 1960, specifically found that the appellants had "vigorously argued" the invalidity of the involved statute and its conflict with the Commerce Clause and the 14th Amendment to the Constitution of the United States (R.324), the Court, in its opinion, did not otherwise directly discuss the Federal questions here sought to be reviewed. It did, however, rely upon, and cite, three decisions of this Court in support of its holding the attacked statute to be valid. It is apparent the Supreme Court of Arkansas decided this case upon the constitutional issues raised, pleaded and argued by the appellants.

QUESTION PRESENTED

Whether the State of Arkansas may lawfully assess, levy and collect an *ad valorem* tax upon motor carrier properties owned or leased, used, operated and driven within, through and across the State of Arkansas, by nonresident motor carriers engaged in transportating property for compensation in interstate commerce, pursuant to Certificates of Public Convenience and Necessity issued by the Interstate Commerce Commission; and whether such tax, as levied and assessed, is violative of and contrary to Article 1, Section 8, Clause 3, the Commerce Clause, and Section 1 of Amendment No. 14 to the United States Constitution, and whether the Supreme Court of Arkansas erred in holding the assessment, levy and collection of such *ad valorem* tax to be valid and neither violative of nor contrary to the named provisions of the Federal Constitution.

STATUTES INVOLVED

The pertinent statutory provisions, Sections 84-601-615, inclusive, Arkansas Statutes, 1947, are set forth in Appendix "C" (Pages 9a-12a).

STATEMENT

Appellants are motor carriers domiciled outside of Arkansas, operating wholly in interstate commerce into, through and across the State of Arkansas, pursuant to Certificates of Public Convenience and Necessity issued to them by the Interstate Commerce Commission. 14 are transporters of automobiles by truckaway and driveaway methods. 5 are transporters of household goods by motor vehicles. None maintain any office, agent, equipment or property within the State of Arkansas.

Some of the appellants make deliveries within the State of Arkansas. Others merely traverse Arkansas highways enroute to destinations in States beyond Arkansas. Some deliver automobiles by the conventional transport method, whereby vehicles are loaded upon a double-deck trailer. Others engage in what is known as the drive-away method of delivery of automobiles, whereby one automobile is attached to another by means of a towbar or chain and driven over the highways, to destinations beyond the State of Arkansas. Household goods movers transport household goods by the trailer method, some making deliveries and pickups within the State of Arkansas and others merely traversing Arkansas highways, enroute to destinations beyond the State of Arkansas.

Pursuant to the provisions of Section 84-601-615, Ark. Statutes 1947, the State of Arkansas, for various years, assessed *ad valorem* taxes against the properties of the appellants. Believing that the State of Arkansas lacked

authority to make such assessments, or to enforce collection of *ad valorem* taxes upon their properties used and operated wholly in interstate commerce, the appellants refused payment of the tax. The State of Arkansas, through its Attorney General, as prescribed by statute, instituted suit in the Chancery Court of Pulaski County, Arkansas, Second Division, to collect alleged delinquent taxes and accrued statutory penalties.

Within the time prescribed by statute, the appellants, individually and collectively, filed their answer in the Chancery Court of Pulaski County, Arkansas, Second Division, wherein they raised the invalidity of the tax sought to be collected, and asserted that such tax and the assessment thereof were violative of, and contrary to, Article 1, Section 8, Clause 3, of the United States Constitution, commonly known as the Commerce Clause, and Section 1 of Amendment No. 14 to the Constitution of the United States. The original answer of the appellants, in the lower Court, consists of 28 separately numbered paragraphs, and included in, and as a part of, a large number of these separately numbered paragraphs, these appellants, jointly and severally, pleaded the invalidity of the tax and the action of State officials thereunder in making assessments thereof, as being contrary to, and violative of, the Commerce Clause and Due Process Amendment to the United States Constitution (R.11;37;63).

The Chancery Court of Pulaski County, Arkansas, Second Division, in its Memorandum Opinion and Order and in its Decree (R.110;131), specifically held that the statutes involved, and the action of the State officials thereunder, were neither violative of, nor contrary to, the Commerce Clause and the Due Process Amendment to the United States Constitution. The lower Court found that operations conducted in the transportation of automobiles

by the "drive-away system" were not subject to the "impact of the tax," (R.137) but neither the lower Court nor the Supreme Court of Arkansas made a specific finding that such tax was invalid or unconstitutional as applied to such drive-away operations. The Memorandum Opinion and Order is shown at page 110 of the Record; and Decree of the lower Court is found on page 131 of the Record. Upon appeal to the Supreme Court of Arkansas, these appellants, by original brief and by brief in support of a Petition for Rehearing, reiterated and consistently argued that the statute here involved, and the action of the Arkansas taxing officials thereunder, are and were contrary to and violative of Article 1, Section 8, Clause 3, the Commerce Clause and Amendment No. 14 to the Constitution of the United States.

Additionally, the appellants argued, by their pleadings and briefs, in the lower Court and the Appellate State Court, that due to their method of operation, their failure to operate upon schedule over regular routes, none of their respective properties acquired any tax situs within the State of Arkansas, and, therefore, the *ad valorem* tax sought to be collected from them was, in fact, either a tax levied upon interstate commerce and the instrumentalities of interstate commerce, or in effect a privilege tax for the exercise of their Certificates of Public Convenience and Necessity issued by the Interstate Commerce Commission, forbidden by the Commerce and Due Process Clauses of the United States Constitution. Additionally, the appellants challenged the formula under which the taxing authorities of Arkansas made *ad valorem* tax assessments against them, and especially that portion which failed to give them credit for taxes paid in other States upon equipment operated into, through and across the State of Arkansas; in failing to give them credit for liabilities incurred in the conduct of their business; for in-

cluding within the assessment the value of a Certificate of Public Convenience and Necessity issued by the Interstate Commerce Commission; for the inclusion of non-operating carrier properties; for the inclusion of property in transit, moving wholly in interstate commerce, originating points beyond the State of Arkansas and moving to destinations beyond the State of Arkansas.

The record reflects, and it is undisputed, that no part of the proceeds of the *ad valorem* tax here involved is, by the State of Arkansas, allocated to, or used in, the construction, maintenance and repair of Arkansas highways and bridges (Exhibit 1, Record 314). All moneys collected are allocated to the "General Revenue Fund" as a "Special Fund" to be used to reimburse the State for certain auditorial services rendered the counties, and any balance is remitted to the "County Aid Fund" of the various counties in the State (R.314).

THE QUESTIONS ARE SUBSTANTIAL

The issues here involved relate directly to the power of the State of Arkansas to assess, and levy and collect an *ad valorem* tax upon properties, including Certificates of Public Convenience and Necessity issued by the Interstate Commerce Commission, leased properties, property in transit, properties taxed by a State of domicile, and upon the instrumentalities of interstate commerce, used, operated and transported by certificated motor carriers transporting and delivering automobiles and household goods into, through and across the State of Arkansas by motor vehicle, and upon property in transit, moving across the State of Arkansas in interstate commerce.

The appellants have contended, and now contend, that the Arkansas *ad valorem* tax statute here involved, and the actions of the Arkansas taxing officials in making

assessments and attempting collections thereunder, are violative of and contrary to Article 1, Section 8, Clause 3, the Commerce Clause, and Section 1 of Amendment No. 14 to the United States Constitution, as assessing and levying a tax upon interstate commerce and the instrumentalities thereof, and as depriving these appellants of their properties without due process of law. That the assessment of *ad valorem* taxes upon interstate motor carriers, such as the appellants, by a single State likewise provokes similar action by other States, into, through and across which the same identical property may be used, operated or driven, thereby resulting in, and likely to result in, multiple State taxation of interstate commerce and the instrumentalities thereof, contrary to the Commerce Clause and the 14th Amendment to the United States Constitution; and that these matters directly affect the transaction of interstate business by the appellants, and directly affect their use of State highways being traversed and used by them pursuant to Certificates of Public Convenience and Necessity issued to them by the Interstate Commerce Commission, and directly affect their ability to conduct their business without interference or hindrance on the part of officials of the State of Arkansas and other States of the nation; and appellants assert that the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

The State of Arkansas has attempted to use an apportionment formula in arriving at each assessment here involved. This apportionment, as shown by the Record, page 165, utilizes, primarily and principally, system miles to miles traveled within the State of Arkansas. Appellants have contended, and now contend, that such apportionment based upon miles traveled is illegal for the purpose of arriving at the value of properties used in inter-

state commerce into, through and across the State of Arkansas, and, moreover, that such a formula may not be invoked against properties actually in transit across the State of Arkansas originating at a point beyond and destined to a point beyond, and that the use of such formula deprives these appellants of their property without due process of law, in contravention of the 14th Amendment to the Constitution of the United States.

Research fails to locate any decision of this Court directly in point, involving a state *ad valorem* tax assessed upon interstate motor carriers. This Court has upheld the validity of *ad valorem* taxes assessed and levied by States upon railroads (*Pullman's Car Co.* v. *Pennsylvania*, 141 U.S. 18), airplanes (*Braniff Airways* v. *Nebraska*, 347 U. S. 590), and ships (*Ott* v. *Mississippi Barge Line*, 336 U. S. 169) engaged in interstate commerce, but appellants believe a substantial and material difference exists in the legal problems posed by the instant case; and different principles of law should be applied to interstate motor carriers, using the highways of various States, including Arkansas. Ships, railroads and planes operate upon schedules. Regularity of service is their chief characteristic. Crews are regularly and constantly maintained for loading and unloading of passengers and cargo. Reservations in advance are usually necessary to insure accommodations. Public facilities, such as loading and unloading equipment, docks, wharves, terminals, airports, radar and safety towers and equipment, and airfields constructed with public funds, are utilized by ships and planes, and hence, these types of public carriers should be, and are, required to contribute toward the cost of such public facilities and their maintenance. These public facilities are used in addition to those owned or operated by these carriers, and permanently stationed in various States in which they do business. Agents are main-

tained to enable the public to transact business with the carriers. Contracts of carriage are entered into with the public. Railroads have permanent facilities throughout their vast systems, consisting of trackage, bridges, depots, stations, roundhouses, offices, repair facilities. All these have a permanent situs within a given State. Railroad cars are continuously operated within and across the States.

Here, appellants operate neither upon regular routes nor upon regular schedules. No public facilities other than public highways of Arkansas are utilized, and for their use appellants pay gasoline tax to the State of Arkansas and various States and the Federal Government. None of the appellants have any places of business within the State of Arkansas. No permanent facilities are maintained in Arkansas. In the case of automobile transporters, no contracts are entered into within the State of Arkansas. It is admitted, in this case, that none of the proceeds of the involved tax are dedicated or used by the State of Arkansas for the construction, maintenance and repair of the highways and bridges. The record fails to show that any of this tax is used for the cost of maintaining any governmental agencies having supervision over motor carriers. Additionally, these appellants purchase license plates from those States where reciprocity does not exist. In-transit fees are paid upon vehicles being driven across the State.

Additionally, it is to be recognized, and has been recognized by this Court, that ships, railroads and planes subject to *ad valorem* tax, all engage in local activities within the taxing State. Such local activities require permanent personnel, facilities and equipment. The record here reflects that the appellants employ no equipment, personnel or facilities within the State of Arkansas. No

wages are paid to employees in Arkansas. All contracts are executed without the State of Arkansas. The tax here sought to be levied involves automobile transporters and movers of household goods operating wholly in interstate commerce, with properties having no permanency within the State of Arkansas, and without that degree of permanency required to establish a tax situs within the State. No such situation exists as in the case of ships, railroads and planes, whose facilities, used in local activities, have acquired, and do acquire, permanency within each state into which they operate and within which they maintain facilities and transact business. Tax situs was not discussed by the Arkansas Supreme Court. The peculiar and different situations here obtaining should be resolved by this Court accepting jurisdiction of, and deciding, the issues in this case.

Appellants, therefore, assert that prior decisions of this Court, upholding the validity of an *ad valorem* tax upon railroads, ships and planes, cited by the Arkansas Supreme Court in its opinion, are inapposite and inapplicable. The *modus operandi* is here vastly different and distinct. The Arkansas Supreme Court failed to recognize this difference and distinction and grouped together all appellants—those transporting property within, through and across the State of Arkansas in motor vehicles, and motor vehicles being driven across the State of Arkansas in transit for delivery to points outside the State of Arkansas. As to the latter, it held that such vehicles are not subject to the "impact of the tax" but no specific finding of invalidity was made thereon. The Arkansas Supreme Court held all motor carriers and their properties subject to *ad valorem* tax, and thereby erroneously holding that these properties acquired a tax situs in Arkansas, and, while it recognized the various

groups existing, nevertheless, held this to be of no importance in determining the question of the validity or invalidity of the challenged tax.

Appellants submit that a genuine separation of the taxed local activity, based upon miles travelled in Arkansas, from the interstate process, is here impossible and if the instant tax be upheld, it is more likely and possible that other States through which such interstate commerce flows can, with equal right, impose similar levies, with the net result of prejudicing and unduly burdening interstate commerce, and thereby resurrecting the customs barriers which the Commerce Clause was designed to eliminate.

The issues involved in this appeal are similar to those raised by, and the decision of the Arkansas Supreme Court is contrary to, *Commonwealth of Pennsylvania* v. *Eastman Kodak Company*, 124 A.2d 100, Cert. denied, 352 U. S. 952; *Michigan-Wisconsin Pipe Line Company* v. *Calvert*, 347 U. S. 157; *Joseph* v. *Carter & Weekes Stevedoring Company*, 330 U. S. 422; *Railway Express Agency, Inc.* v. *Virginia*, 347 U. S. 359; *Gloucester Ferry Company* v. *Pennsylvania*, 114 U. S. 196; *Spector Motor Service* v. *O'Connor*, 340 U. S. 602; *New York Central Railroad Company* v. *Miller*, 202 U. S. 584; *Minnesota* v. *Blasius*, 290 U. S. 1; *Roy Stone Transfer Company* v. *Messner* (Penn.) 103 A.2d 700; *Lebeck* v. *State* (*Arizona*) 156 P.2d 720; *Commercial Carriers, Inc.* v. *Kentucky Tax Commission*, 321 S.W. 2d 42; *Felten Truck Lines, Inc.* v. *The State Board of Tax Appeals of the State of Kansas*, 327 P.2d 836; *Pfeiffer* v. *State*, 226 Ark. 825, 295 S.W. 2d 365. Appellants believe these cases are here directly in point and fully sustain the jurisdiction of this Court in this case. The cited State court decisions involve the validity of State *ad valorem* taxes upon properties used in interstate

commerce, attacked as impinging upon the Federal Constitution. The cited decisions of this Court were cited by the various State courts in support of their holdings that a State may not lawfully collect *ad valorem* taxes upon properties such as are here involved.

SUMMARY

The questions presented by this appeal are substantial, of public importance and in the public interest, and of importance and interest to the entire motor carrier industry engaged in the transportation of property by motor vehicles, over the highways, in interstate commerce. Interstate commerce and instrumentalities of interstate commerce are here vitally affected and directly involved. A burden upon interstate commerce is here threatened. Multiple State taxation of interstate commerce is here an issue. These appellants submit that the decision of the Supreme Court of Arkansas is erroneous and contrary to controlling principles of law, applicable to the issues and matters here involved.

This Court should, in the public interest, hear and determine the issues here involved, so that State taxing authorities and interstate motor carriers transporting property in interstate commerce over the highways, may definitely know their respective rights, liabilities and authority.

Respectfully submitted,

GEORGE S. DIXON
2150 Guardian Building
Detroit 26, Michigan
LOUIS TARLOWSKI
601 Rector Building
Little Rock, Arkansas
Attorneys for Appellants

MATHESON, DIXON & BIENEMAN
2150 Guardian Building
Detroit, Michigan
Of Counsel

PROOF OF SERVICE

I, Louis Tarlowski, one of the Attorneys for all named Appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ..... day of ....., 1961, I served a copy of the foregoing Jurisdictional Statement by personally delivering the same to Bruce T. Bullion, Esq., Union Life Building, Little Rock, Arkansas, Counsel of Record for the Appellee.

Attorney for Appellants
601 Rector Building
Little Rock, Arkansas

APPENDIX A

In the Supreme Court of Arkansas

ARCO AUTO CARRIERS, INC., ET AL ..... *Appellants*

v. No. 2253

STATE, EX REL. BRUCE BENNETT
ATTORNEY GENERAL ..... *Appellee*

Opinion Delivered November 21, 1960

APPEAL FROM PULASKI CHANCERY COURT

SECOND DIVISION

SAM ROBINSON, ASSOCIATE JUSTICE

This action was brought by the State of Arkansas to enforce the collection of certain ad valorem taxes on trucks and equipment used by appellants in hauling for hire into and through the State of Arkansas in interstate commerce, automobiles and other merchandise. The issue is the validity of the tax. The chancellor held that the tax is valid, and the transportation companies have appealed. On motion of appellant Greyvan Lines, Inc., its appeal has been dismissed.

The tax is authorized by Ark. Stat. 84-601. The property used in interstate commerce and in issue here is divided into two categories: The vehicles used in hauling

merchandise into this State, and vehicles used in hauling merchandise through the State. Insofar as this case is concerned, there is no distinction. The vehicles used in both categories are engaged in interstate commerce. No provision of our Constitution is pointed out as prohibiting the act in question. But appellants vigorously argue that the statutes authorizing the tax, and also the action of the taxing officials of Arkansas in attempting to collect the tax, violate Article 1, Sec. 8, the commerce clause of the United States Constitution, and the 14th Amendment.

Conceding that the owners of the equipment involved in this case could not be compelled to pay an excise or privilege tax (*State* v. *American Refrigerator Transit Co.*, 151 Ark. 581, 237 S.W. 78), the fact remains that only an *ad valorem* tax is involved here, and the tax is on property that may be found in this State. It is immaterial that such property may not be moved on any regular route or schedule. Conceivably millions of dollars' worth of transportation equipment belonging to appellants could be in the State at all times, with the owners thereof being afforded the benefits and protection of a duly constituted, organized and functioning state government. And, moreover, the fact that no particular piece or pieces of such equipment would be here for any designated time should not relieve the owners thereof from bearing their fair share of maintaining and operating a state government, with all its ramifications, that serves all the people, including the owners of the transportation equipment found in the State, regardless of where such owners may be domiciled.

Of course, in the circumstances of the property not being in the State 100% of the time and subject to an *ad valorem* tax in other states, this State can only levy a tax based on a formula "which fairly apportions the tax

to the commerce carried on within the state." *Standard Oil Co.* v. *Peck*, 342 U.S. 382. In the case at bar it appears that such a formula was used, but if the formula is not fair, appellants have an administrative remedy. Ark. Stats. 84-609, 84-612, 84-115. Here, however, they did not pursue the administrative remedy to a final conclusion.

This case is controlled by three cases heretofore decided by the United States Supreme Court. First in the case of *Pullman's Car Co.* v. *Pennsylvania*, 141 U.S. 18. There the Court said: "For the purposes of taxation, as has been repeatedly affirmed by this court, personal property may be separated from its owner; and he may be taxed, on its account, at the place where it is, although not the place of his own domicil, and even if he is not a citizen or a resident of the State which imposes the tax. . . . It is equally well settled that there is nothing in the Constitution or laws of the United States which prevents a State from taxing personal property, employed in interstate or foreign commerce, like other personal property within its jurisdiction (Citing cases)."

Next is *Ott* v. *Mississippi Barge Line*, 336 U.S. 169. In that case it was held that the doctrine of the Pullman case is applicable to barges and towboats, moving freight in interstate commerce up and down the Mississippi River. *Ad valorem* taxes levied on such transportation equipment by Louisiana and the City of New Orleans were upheld.

The third case is *Braniff Airways* v. *Nebraska Board*, 347 U.S. 590. The issue was the authority of Nebraska to levy an *ad valorem* tax on aircraft, the owners of which were domiciled in other states, such aircraft being found in Nebraska but used in interstate commerce. The Supreme Court upheld the right of the State to collect a tax

properly apportioned on the basis of the use of the aircraft in Nebraska compared to the over-all use of such equipment.

As shown by the above mentioned cases, the United States Supreme Court has upheld an *ad valorem* tax when fairly apportioned on railway, barge line and aircraft equipment used in interstate commerce. There is no sound reason why such a tax is not equally valid when applied to vehicles used on the roads of the State. The State of Arkansas did not levy the tax on the full value of the equipment; a mileage formula was used. This formula determines the percentage of the total time the property may be found within this State and the percentage of time the assets of the appellants are employed here for purposes of *ad valorem* taxes. Appellants also attack here the formula used, but they did not exhaust their administrative remedy on such question.

Appellants contend also that Article 2, Sec. 23, of the Constitution of Arkansas prohibits *quasi* judicial commissions from making assessments for *ad valorem* tax purposes. In *McDaniel* v. *Texarkana C. & M. Co.*, 94 Ark. 235, 126 S.W. 727, the Court said: "The Legislature has the power to make all property in this State subject to taxation, except property exempted by the Constitution. It has the power to provide where and in what manner said taxes shall be levied and collected; and it may classify corporations and corporate interests for the purpose of taxation, and specify the mode of the assessment, levy and collection of taxes on corporate properties and interests." But appellants contend that Amendment No. 47 to the Constitution of this State prohibits the levy of an *ad valorem* tax by the State. Here the State has levied no *ad valorem* tax. An agency of the State has merely ascertained the value of the property. True, under the

provisions of Act 168 of 1953 (Ark. Stat. 84-614) the Commissioner of Revenues collects tax, but the same act provides that the State Treasurer shall pay the amounts so collected to the County Aid Fund and in turn shall distribute same to the various counties on a proportionate basis as set out therein (Ark. Stat. 84-615). It can readily be seen that this is a county tax merely administered by a State agency for the purpose of efficiency, and therefore is not in violation of Amendment 47.

Affirmed.

APPENDIX B

In the Supreme Court of Arkansas

ARCO AUTO CARRIERS, INC., ET AL ..... *Appellants*

v. No. 5—2253

STATE OF ARKANSAS, EX REL BRUCE BENNETT, ATTORNEY GENERAL ..... *Appellee*

Certificate of State Court as to Existence of a Federal Question

On motion of appellants, Arco Auto Carriers, Inc., Associated Transports, Inc., Automobile Transports, Inc., of Delaware, Central Truckaway System, Complete Auto Transit, Inc., E. & L. Transport, Inc., of Indiana, Fleet Carrier Corporation, Fugate & Girton Driveaway Company, Inc., Kenosha Auto Transport Co., Inc., King Transport, Truckaway Corporation, Robert R. Walker, Inc., United Transports, Inc., Auto Transports, Inc., Burnham's Van Service, Bekins Van Lines, North American Van Lines, Inc., National Van Lines, Inc., and Weathers Brothers Transfer Company, Inc., this Court, in addition to the orders made herein, orders it to be certified and made a part of the record in this case and of the judgment and entry of affirmance heretofore rendered and made herein, that in the prosecution of error from the Chancery Court of Pulaski County, Arkansas, Second Division, and in the arguments by brief, made in this Court on behalf of the appellants, it was insisted and relied upon by said appellants that the Arkansas Statutes 1947, Section 84-

601, *et seq.*, and the actions of State officials thereunder, is illegal and void and violative of Article 1, Section 8, Clause 3, of the Constitution of the United States, the Commerce Clause, and Section 1 of Amendment No. 14 thereto, and it became material to the determination of said case in this Court to determine said question so made by the appellants, which was determined adversely to said appellants, as appears in the entry and judgment of affirmance heretofore made herein.

It is hereby certified that this Court is the highest Court of law and equity in the State of Arkansas in which a decision of this case could be had.

The Clerk of this Court is directed to file this certificate and to make the same a part of the official record of proceedings had in this case.

/s/ Carlton Harris
Chief Justice
Supreme Court of Arkansas

APPENDIX C

SYNOPSIS OF ARKANSAS STATUTES RELATING TO ASSESSMENT AND TAXATION OF INTER-COUNTY MOTOR CARRIERS

All property, both real and personal, used in the operation of inter-county motor carriers (defined to be any person, firm, company, co-partnership, association or corporation engaged in the business of transporting for hire within, from or through this State by motor vehicle over the public highways of the State, passengers or freight, or both) shall be assessed for General Property or Ad Valorem taxation by the Arkansas Public Service Commission, and, each such carrier shall, on or before the first day of March of each year, make a report in writing to the Commission, in such form as the Commission shall prescribe, showing all property subject to assessment and taxation in this State; such report to truly show the amount, kind and value of such property as of January first, next preceding. (Sections 84-601 and 84-602, Arkansas Statutes, 1947.)

Carriers failing to make and file reports with the Commission on or before March 1st, unless for cause shown an extension of time for filing said report shall have been granted by the Commission, are subject to penalty of not to exceed $1,000, plus an additional penalty of not to exceed $100 for each day's delinquency after March 1st. (Section 84-607, Arkansas Statutes, 1947.)

If any carrier whose assessment is herein provided for shall neglect or refuse to make and file report with the Commission by the first day of March, or who makes such report and fails to show or shows erroneously any information called for which would be material to the determi-

nation of any fact to be ascertained by the Commission in connection with the amount, description, location and value of the property required to be assessed, the Commission shall inform itself as best it can on such undisclosed facts in order to discharge its duties with respect to the assessment of the property of such carrier and proceed to assess the same. (Section 84-608 Arkansas Statutes, 1947.)

In valuing the property of such carrier, the Commission shall take into consideration the value of all the property of the carrier as a unit, whether all or only a part of it is within this State, and shall ascertain the value of all property, tangible and intangible, including good will, easements and franchises, except the right to be a corporation; it being the purpose of this Act to include in the valuation every element that adds to the value of the line. (84-604 and 84-605, Arkansas Statutes, 1947.)

Having ascertained the true market or actual value of the entire property of the carrier, tangible and intangible, both within and without the State, the Commission will deduct therefrom the true market or actual value as ascertained from the information furnished by report or otherwise, of all real and personal property of such carrier not used in its motor carrier operation, and the remainder shall be treated as the true market or actual value of all its property, tangible and intangible, actually used or employed in its motor carrier operations. The Commission will then ascertain and fix the value of the total motor carrier operating property in this State by taking such proportion of the true market or actual value of the entire motor carrier operating property as its total lines within this State bear to the total lines both within and without this State, or as its total receipts or income from operation within this State bear to its total receipts or income

from operation both within and without this State, or by using such other recognized method, or combination of methods, as will, in the judgment of the Commission, result in a just and equitable apportionment to this State of its due proportion of the value of the total motor carrier operating property. (Section 84-610 Arkansas Statutes, 1947.)

Having determined the taxable value of the carrier operating property within this State (legally 20% of true market or actual value), the Commission shall give notice in writing to the owner, officer, agent, or attorney making such tax report, or if no tax report has been filed, then to the party or company against which the assessment has been made, showing the total taxable valuation so fixed by the Commission. (Section 84-612 Arkansas Statutes, 1947.)

If the owner of the property so assessed is dissatisfied with the action of the Commission, such owner, within 10 days from date of notice, may file with the Commission a written petition for a review of said assessment. All hearings on said petitions shall be had before the Commission or its agent prior to the first day of October. (Section 84-612, Arkansas Statutes, 1947.)

The taxable valuation of the carrier operating property in this State having been finally fixed, the Commission shall levy and extend against such valuation the average rate of Ad Valorem Levy prevailing throughout the State for the assessment year, and, 10 days before due date, shall certify same to the Commissioner of Revenues for collection. The Commissioner of Revenues shall forthwith notify each carrier against which a tax has been extended the amount and due date thereof. Such tax shall be payable to the Commissioner of Revenues on or before the 3rd Monday in April of the year next following

the year in which assessment was due to have been fixed. If such tax be not paid on or before the said 3rd Monday in April, the Commissioner of Revenues shall add a penalty of ten (10%) per centum thereon and mail to each such carrier so delinquent a statement of such tax and penalty. If such tax and penalty be not paid on or before the next following first day of October, the Commissioner of Revenues shall, in lieu of the ten (10%) per cent penalty, add to such tax a penalty of twenty-five (25%) per cent and certify the same to the Attorney General for collection. (Section 84-614, Arkansas Statutes, 1947.)

No. 109

JAMES R. BROWNING.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

ARCO AUTO CARRIERS, INC., ET AL. *Appellants*

v.

STATE OF ARKANSAS, EX REL.
BRUCE BENNETT, ATTORNEY GENERAL *Appellee*

ON APPEAL FROM THE
SUPREME COURT OF THE STATE OF ARKANSAS

REPLY TO JURISDICTIONAL STATEMENT

Of Counsel:

J. FRANK HOLT
Attorney General
State of Arkansas

BRUCE T. BULLION
600 Union Life Building
Little Rock, Arkansas
Special Assistant
Attorney General
State of Arkansas

Attorney for Appellee

PARAGON PRINTING CO., LITTLE ROCK

INDEX

	Page
Opinion Below	1
Jurisdiction	1
Question Presented	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	2
The Question Is Not Substantial	5
Conclusion	9

Table of Cases

Braniff Airways *v.* Nebraska, 347 U.S. 590, 98 L. ed. 967	7
Northwest Airlines *v.* Minnesota, 322 U.S. 292, 88 L. ed. 1283	7
Northwestern States Portland Cement Co. *v.* Minnesota, 358 U.S. 450, 3 L. ed. (2) 421	8
Ott *v.* Mississippi Valley Barge Line Co., 336 U.S. 169, 93 L. ed. 585	7
Pullman's Car Co. *v.* Pa., 141 U.S. 18, 35 L. ed. 613	3,6,7
Railway Express Agency, Inc. *v.* Virginia, 358 U.S. 434, 3 L. ed. (2) 450	8
Standard Oil Co. *v.* Peck, 342 U.S. 382, 96 L. ed. 427	7
Union Refrigerator Transit Co. *v.* Kentucky, 199 U.S. 195, 50 L. ed. 150	6

No._____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

ARCO AUTO CARRIERS, INC., ET AL ..... *Appellants*

v.

STATE OF ARKANSAS, EX REL
BRUCE BENNETT, ATTORNEY GENERAL ..... *Appellee*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS

REPLY TO JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the Supreme Court of Arkansas sought to be reviewed by the petition for appeal is not yet officially reported, but is found in the appendix ("A" pp. 1a-5a) to the Jurisdictional Statement of Appellants.

JURISDICTION

Appellants seek to review the action of the Supreme Court of Arkansas in affirming a decree of the Chancery Court of Pulaski County, on March 25, 1960, whereby the right and authority of the State of Arkansas to levy and collect *ad valorem* taxes, proportionably, upon the properties of appellants found in Arkansas, was upheld and sustained. Re-hearing was denied by the Supreme Court of Arkansas on January 9, 1961.

QUESTION PRESENTED

Whether the State of Arkansas may lawfully assess, levy and collect, proportionably, *ad valorem* taxes upon the properties of non-resident motor carriers, operating pursuant to certificates of convenience and necessity from the Interstate Commerce Commission, into and through the State of Arkansas; said proportionate basis being the ratio of total Arkansas miles to system miles for the taxable period. The Arkansas Courts have held that this tax as so assessed and levied, does not violate Article 1, Section 8, Clause 3, and Section 1 of Amendment 14 to the United States Constitution. Appellant urges that this Arkansas tax does violate these constitutional provisions.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Arkansas Statutes which appellants urge violate the Constitution of the United States are Sections 84-601 to 615, inclusive, of the Arkansas Statutes of 1947, and are set forth in Appendix "C" (pp. 9a-12a), to appellants' Jurisdictional Statement.

2. Appellants argue that the enforcement of the above statutory provisions by the State of Arkansas, and against them, individually, even on a proportionate basis of Arkansas miles to system miles violates: (a) Article 1, Section 8, Clause 3; and (b) Sec. 1, of Amendment 14 to the United States Constitution; which the appellee vigorously denies.

STATEMENT OF THE CASE

The State of Arkansas for many years has derived a substantial portion of her tax revenues necessary for governmental operation, from the *ad valorem* tax on per-

sonal and real property situated within her borders. The problem of assessing and collecting such taxes from businesses operating partly within and partly without this State is now a new one to the officials charged by law with that responsibility but a review of the facets to this problem, at this time, would be of little benefit. Needless to say, however, as early as 1911 this State became conscious of the problem, as the same is and was then, applicable to railroad operations, both passenger and freight rail service. Consistent with the pronouncement of the applicable law by this Court in the *Pullman Palace Car* cases (e.g., *Pullman's Car Co. v. Pa.*, 141 U.S. 18, 35 L. ed. 613), wherein this Court affirmed the so-called mileage formula of *ad valorem* taxation on interstate operations, the State of Arkansas has consistently pursued and applied that formula against the properties of interstate railroads (all phases); utilities (gas, light, water and telephone companies); bus companies; and motor freight companies.

The system of assessment, applied by Arkansas in such cases, is that each of these companies operating partly within and partly without this State, are required to list all of their properties, annually, on forms prescribed by the Arkansas Assessment and Coordination Division (and its predecessor agencies by various names). In addition to the property listings and their asserted value by the taxpayer, the taxpayer was also required to report: (1) the total system miles travelled throughout the taxable year; and (2) the total Arkansas miles thereof.

Upon receipt of these forms, the Arkansas agency would make certain deductions and adjustments in the properties so reported, in accordance with law, and to the balance left would multiply it by the percentage which the Arkansas miles bears to system miles and the figure thus

determined would constitute the value of the properties for purposes of the assessment of Arkansas *ad valorem* taxes. In case a taxpayer in the category here considered failed to submit a list of its properties, and their value, the Arkansas agency would make an assessment thereof on the basis of the best information available. In any event, the taxpayer would be thereupon notified of the taxable value of its property, and advised that it had a specified time in which to protest the said assessment. Thereafter, the taxes against each carrier were certified for collection, and the administrative portion of this taxing responsibility for this governmental agency came to an end.

The procedure, above detailed, was followed by the State of Arkansas, for the years here involved as against all carriers by motor vehicle, including appellants. Appellants were notified of the tax as assessed against each of them, and instead of pursuing any administrative remedy, as provided by Arkansas law to protest such matters, appellants simply ignored the tax and failed and neglected to pay it. In due time, these delinquent taxes were certified to the Attorney General for collection, and this suit was filed in the Pulaski Chancery Court to collect such taxes. Appellants answered or intervened in this suit and challenged the constitutionality of the Arkansas *ad valorem* tax alleging (1) it violated the Commerce Clause of the Constitution of the United States; and (2) it violated the "due process" clause of the same Constitution. In addition, appellants challenged the tax on certain other grounds, i.e., that certain properties had been either erroneously or unlawfully included in the values determined as the base for the tax.

The Pulaski County Chancery Court sustained the power of the State to levy and collect these taxes against appellants, and in doing so held that the tax, as propor-

tionately assessed against appellants on the "mileage formula" basis, did no violence to the Constitution of the United States; and insofar as the other challenges against this tax, held that appellants had failed to pursue the administrative remedy provisions of the Arkansas law, and, therefore, were in no position to assert such arguments in this action.

Appellants appealed this adverse decision to the Supreme Court of Arkansas and that Court unanimously sustained the decision of the lower court. In their argument of insistence that the Arkansas *ad valorem* tax, as applied to their operation, was constitutional, the appellants base their argument upon the theory that because their operation does not consist in regular schedules or routes, that for some reason yet unknown (other than their plea that "it should make a difference") to appellee, this distinguishes the case from the previous pronouncements of this Court.

THE QUESTION IS NOT SUBSTANTIAL

The mere assertion that a question is substantial does not necessarily make it so. A determination of such an assertion must first consider the question in the light of the adjudicated cases, and from that analysis will come the basic understanding as to whether this case presents facts falling clearly within the prior pronouncements.

The State of Arkansas here seeks to assess, levy and collect *ad valorem* taxes from non-resident motor carriers (engaged in transporting (1) new automobiles and (2) household goods) who operate in interstate commerce and in the process, operate within her borders. No contention is made by the State that appellants are not, at all times, engaged in interstate commerce, without

doing violence to any constitutional provision, the only requirement being that this property be found within the taxing jurisdiction for the taxable period.

Many years ago this problem was brought to the attention of this Court, and the leading case most frequently cited by legal authorities is *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U.S. 18, 35 L. ed. 613. Decided by this Court in 1890, it was said: "It is equally well settled that there is nothing in the Constitution . . . which prevents a state from taxing personal property employed in interstate or foreign commerce . . ." See also, *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U.S. 195, 50 L. ed. 150; and a collection of cases in 49 ALR at p. 1099.

As in the *Pullman Palace Car* case, *supra*, the State of Arkansas has used a formula which, for lack of a better definition, we shall call a basis of "proportionate situs". She has recognized that the property of appellants is not permanently located in this State, and that appellants constantly cross the state boundary in going out and coming back. Consequently, in accordance with the statute, Arkansas has determined that the taxable portion of appellants' properties is the percentage thereof (less certain deductible properties) that the miles travelled in Arkansas, throughout the taxable year, bears to the total system miles of each such taxpayer. Thus, if one of these appellants travel one million Arkansas miles throughout the taxable year while negotiating one hundred million total system miles, that taxpayer is assessed on the basis of 1% of its personal property (less deductions previously allowed). If, however, another such taxpayer has travelled seventy-five million Arkansas miles out of a total of one hundred million system miles, it is assessed, by Arkansas, on the basis of 75%, etc.

This Court has consistently adhered to the principle laid down in *Pullman Palace Car Co., supra*, with the possible exception of *Northwest Airlines* v. *Minnesota*, 322 U.S. 292, 88 L. ed. 1283. And, whether this last cited case was a departure from the rule of *Pullman Palace* is unimportant because in the later case of *Braniff Airways* v. *Nebraska*, 347 U.S. 590, 98 L. ed. 967, the Court promptly brought the problem of *ad valorem* taxation of airlines by the states into harmony with the rule laid down in *Pullman Palace*. As to the validity of such taxes as applied to interstate movement of boats and barges see *Ott* v. *Mississippi Valley Barge Line Co.*, 336 U.S. 169, 93 L. ed. 585, and *Standard Oil Co.* v. *Peck*, 342 U.S. 382, 96 L. ed. 427. See also an Annotation in 26 ALR (2) 1376.

In spite of this long standing precedent, appellants' attempt to assert "substantial question", or, to put it another way, different facts, on the theory that because they do not operate on schedules or over regular routes, this in some mysterious way justifies an assertion that their properties cannot be "found" in Arkansas for purposes of taxation. Irregular routes and a non-scheduled basis, so appellants argue, brings into play some fanciful hocus-pocus of "now you see it—now you do not see it". The State of Arkansas urges that this question has been many times decided by this Court adverse to appellants' argument. For instance, we can find nothing in *Pullman Palace*, *Ott* or *Standard Oil Co., supra*, that requires the question of situs to depend upon schedules or regular routes, and, the reality of the problem certainly dictates to the contrary. The truck, railroad car, barge, boat, etc., is just as present in the one case as the other; it is "found" within the state, proportionately, with the same accuracy (using the mileage formula) as is the scheduled, regular route carrier. One is none the less a reality than is the other, and to urge such a fanciful differentiation is to strain at a gnat. The law in this field is firmly es-

tablished and has been for many years. So, unless this Court determines it is now time to review the question with the view in mind of a departure from these long entrenched rules, the question which appellants seek to argue is not of a substantial nature.

The appellants would urge upon this Court that because the States of Kentucky, Pennsylvania and Kansas have reached different results than did the State of Arkansas, regarding the state's power to collect a tax, that this fact alone, perhaps, is sufficient to transform the question from nondescript to substantial. In the first place, appellee does not concede that these cases are similar or analogous. They are not analyzed, however, for the reasons that Arkansas does not believe this Court is too much concerned with whether those states, or all others for that matter, elect to abdicate a right to collect any tax. This is a matter of State policy which this Court has historically and consistently refused to review, so this argument of appellants, no matter how appealing, cannot transform the ordinary and usual into the unique and substantial.

The recent case of *Railway Express Agency, Inc.* v. *Virginia*, 358 U.S. 434, 3 L. ed. (2) 450, and *Northwestern States Portland Cement Co.*, v. *Minnesota*, 358 U.S. 450, 3 L. ed. (2) 421, are typical examples of the expressions of this Court that interstate commerce must bear its fair share of properly apportioned state taxation. When those cases are considered in conjunction with the many expressions of this Court beginning with *Pullman Palace*, *supra*, and weighed in the light of the argument appellants advance that irregular routes and non-scheduled basis of a carrier is sufficient to enable that carrier to escape the incidence of a fairly apportioned state *ad valorem* tax, it cannot be concluded that there is any substantial nature whatever to this argument.

CONCLUSION

The appellants herein have presented no substantial federal question, constitutional or otherwise, nor have they presented any question of sufficient importance and significance to justify the Court in going further with this case. There is no conflict in expressions of this Court, and no novel question presented by appellants. What is presented is merely an attempt to have this Court review its historic and constant holdings that interstate commerce must bear its fair share of state taxes, and, upon such review to then reverse these principles which have become so much a part of our law of this land. There is no argument advanced that the formula used was not applied equally to all, or that the formula used does not constitute a proper method of reaching the portion of appellants' property which can be considered for *ad valorem* taxation by the State of Arkansas. It may be that appellants may seek to argue that certain items of property should not have been included, and, perhaps, that certain deductions were not allowed, in some instances, that should have been allowed. These matters, however, are not properly addressed to the Court in the proceeding now before the Court. They may only be considered by pursuing the administrative remedies provided in the Act, and not in an independent suit of this nature.

It is respectfully submitted that this appeal should be dismissed.

Of Counsel:

J. FRANK HOLT
Attorney General
State of Arkansas

BRUCE T. BULLION
600 Union Life Building
Little Rock, Arkansas
Special Assistant
Attorney General
State of Arkansas
Attorney for Appellee

PROOF OF SERVICE

I, Bruce T. Bullion, Special Assistant Attorney General for the State of Arkansas, her attorney herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 16th day of March, 1961, I served a copy of the foregoing Reply to Jurisdictional Statement by personally delivering three copies hereof to Louis Tarlowski, Esq., Rector Building, Little Rock, Arkansas, counsel of record for appellants.

BRUCE T. BULLION
Attorney for Appellee
600 Union Life Building
Little Rock, Arkansas

FILE COPY

Office-Supreme Court, U.S.
FILED
APR 6 1961
JAMES R. BROWNING, Clerk

No. 785

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

ARCO AUTO CARRIERS, INC., ET AL.,
Appellants,
vs.
STATE OF ARKANSAS, EX REL. BRUCE BENNETT,
Attorney General,
Appellee

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS

BRIEF OPPOSING REPLY TO JURISDICTIONAL STATEMENT

LOUIS TARLOWSKI,
601 Rector Building,
Little Rock, Arkansas;
GEORGE S. DIXON,
2150 Guardian Building,
Detroit 26, Michigan,
Attorneys for Appellants.

MATHESON, DIXON & BIENEMAN,
2150 Guardian Building,
Detroit 26, Michigan,
Of Counsel.

Interstate Brief & Record Co., 356 Congress St. E., Detroit 26, Michigan

INDEX TO AUTHORITIES CITED

	Page
Braniff Airways v. Nebraska, 347 U. S. 590	2
International Shoe Co. v. Washington, 326 U. S. 310	4
Ott v. Mississippi Valley Barge Line Co., 336 U. S. 169	2
Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18	2
Standard Oil Co. v. Peck, 342 U. S. 382	2
Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 785

ARCO AUTO CARRIERS, INC., ET AL.,
Appellants,
vs.
STATE OF ARKANSAS, EX REL. BRUCE BENNETT,
Attorney General,
Appellee

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS

BRIEF OPPOSING REPLY TO JURISDICTIONAL STATEMENT

Appellants file this pleading pursuant to Supreme Court Rule 16(3) in response to Appellee's Reply to Appellants' Jurisdictional Statement in which Appellee seeks to negate Appellants' contention that there is here involved a substantial federal question of first impression requiring resolution and determination by this Honorable Court.

At issue is the constitutionality of an Arkansas statute (Ark. Stat., 1947, Secs. 84-601-615) imposing an *ad valorem*

tax upon property in transit moving into, through and out of Arkansas as a necessary incident to the performance of interstate transportation services by non-resident motor carriers under the authority and requirement of certificates of public convenience and necessity issued by the Interstate Commerce Commission and performed exclusively in interstate commerce while in Arkansas.

In the State Court proceeding and in this Court Appellants have contended (See Jurisdictional Statement and appended Arkansas Supreme Court certificate, Appendix B, page a-7) that the Arkansas statute violates the Commerce Clause and the Due Process Clause of the United States Constitution (Article 1, Sec. 8, Clause 3 and Section 1 of Amendment Fourteen, respectively). Appellee contends in reply that this issue has been resolved adversely to Appellants' contention by this Court in *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18; *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194; *Ott v. Mississippi Valley Barge Line Co.*, 336 U. S. 169; *Standard Oil Co. v. Peck*, 342 U. S. 382; and *Braniff Airways v. Nebraska*, 347 U. S. 590.

Appellee apparently reasons that if *ad valorem* taxes constitutionally may be levied upon the facilities of interstate rail, water and air carriers, the same legal concept may be extended automatically to interstate motor carriers by analogy and irrespective of the facts of record.

The State Court record here establishes that the motor carrier facilities so taxed have no permanent situs in Arkansas, are in all instances in transit while in Arkansas, move exclusively in interstate commerce, move with no regularity, over unspecified routes, move sporadically on call and demand, rather than on schedule, and are in the

possession of the taxed Appellants on an ownership basis in some instances, but in other instances are in the possession of the carrier under lease or under mere bailment (as in the instance of motor vehicles moving under their own power in driveaway service from consignor to consignee). These record facts are undisputed, but Appellee contends that these facts fail to distinguish the case at bar from those above cited and relied upon by Appellee.

The State Court record reveals no clear relationship between the involved tax and the use by the taxed Appellants of Arkansas highway facilities, the tax being levied for general purposes and not specifically for the construction, maintenance or policing of Arkansas highways. For the latter purposes Appellants are subjected to tax exactions under Arkansas statutes other than the Act here under attack. Also questionable is the legality of imposing a state *ad valorem* tax upon the value of an interstate motor carrier's operating authority issued by the Interstate Commerce Commission, as well as imposing the tax on current assets as the basis without credit for current liabilities.

Appellants respectfully submit that where this Court heretofore has approved the imposition of state *ad valorem* taxes upon the facilities of interstate transportation agencies, the taxing entity has been required to establish with reasonable certainty taxable situs within its jurisdiction of the taxed property and some reasonable basis between the amount of the tax and the benefits and privileges enjoyed by the taxpayer. *Ott v. Mississippi Valley Barge Co., supra.* Stated differently, there must be reasonable minimum contacts which will justify a finding that property is "present" within a state, physically or on an apportioned basis, before a state can levy an *ad valorem* tax thereon.

International Shoe Co. v. Washington, 326 U. S. 310; *Braniff Airways v. Nebraska, supra* (18 stops per day); *Pullman's Palace Car Co. v. Pennsylvania, supra* (an average of 100 coaches and cars in Pennsylvania all of the time); *Standard Oil Co. v. Peck, supra* (specific mileage in Ohio waters determined).

In the case at bar it is practically impossible to determine from the record how the Arkansas tax authorities could reach a determination that any specific or even representative property of the taxed appellants acquired taxable situs in Arkansas for any specific period or how the proportionate value of such property attributed thereto bore any reasonable relationship to the value of Appellants' use of Arkansas highways in the performance of interstate transportation. While it is true that this Court heretofore has upheld the constitutionality of state *ad valorem* taxes imposed under reasonable proportionate formulae upon the transportation facilities of interstate carriers by rail, water and air, extension of such legal concept to state *ad valorem* taxation of interstate motor carriers' facilities under circumstances such as those here disclosed is without discernible precedent. Certainly, extension of this legal concept in such an important area of commerce between the states will require something more than automatic application by mere analogy.

Appellants respectfully submit that a substantial federal question of first impression is here involved and that the Appeal should be entertained.

Respectfully submitted,

LOUIS TARLOWSKI,
601 Rector Building,
Little Rock, Arkansas,

GEORGE S. DIXON,
2150 Guardian Building,
Detroit 26, Michigan.
Attorneys for Appellants.

MATHESON, DIXON & BIENEMAN,
2150 Guardian Building,
Detroit 26, Michigan,
Of Counsel.

PROOF OF SERVICE

I, George S. Dixon, one of the Attorneys for all named Appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 3rd day of April, 1961, I served a copy of the foregoing brief opposing reply to jurisdictional statement upon Bruce T. Bullion, Esq., Union Life Building, Little Rock, Arkansas, Counsel of Record for the Appellee, by United States Mail, air mail, postage prepaid.

GEORGE S. DIXON,
Attorney for Appellants,
2150 Guardian Building,
Detroit 26, Michigan.